Fruehauf Corporation *and* Jewel Darby. Case 11-CA-8472-1

April 13, 1981

DECISION AND ORDER

On November 3, 1980, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law found employee Ervin's testimony about an alleged conversation between him and Assistant Plant Manager Thomas too "cryptic and vague and devoid of context" to be reliable. Ervin testified that he had asked Thomas why he was being harassed and transferred so frequently. According to Ervin, Thomas replied that he was being moved because he was the union president. We disclaim any possible suggestion that a finding of animus would depend upon the "context" of a finding of more arduous working conditions. We adopt the Administrative Law Judge's credibility resolution, however, and, accordingly, we find that animus is not established.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: Pursuant to an unfair labor practice charge filed by Jewel Darby, an individual, against Freuhauf Corporation (herein Respondent) and a complaint issued by the Regional Director for Region 11, a hearing was held in Charlotte, North Carolina, on August 25, 1980.[1] The principal issue litigated was whether the Respondent discharged Jewel Darby because of her activities as a union steward.

On October 10, 1980, the General Counsel and Respondent filed briefs. On the entire record in this case, including my observation of the witnesses and their demeanor, and in consideration of the oral argument made at the hearing and the briefs, I make the following:

[1] The Regional Director, on June 18, 1980, severed this case from Cases 11-CA-8431 and 11-CA-8560 with which it had previously been consolidated.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a North Carolina corporation, is engaged in the manufacture of trailers at its facility in Charlotte, North Carolina, where, in a representative period of time, it received goods and materials valued in excess of $50,000, from other States, and from which it shipped during the same period goods and materials valued in excess of $50,000 to other States.

It is admitted and I find that Respondent is an employer engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION STATUS

Allied Industrial Workers of America, Local 576, affiliated with Allied Industrial Workers of America, AFL-CIO (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures trailers and mobile home units. It appears that several hundred employees are employed by it at the Charlotte facility. The production and maintenance employees are represented by the Union, and work under a collective-bargaining agreement negotiated by the Union. Under the collective-bargaining agreement the employees are entitled to representation by union stewards.

The General Counsel contends that Respondent discharged Jewel Darby because of her activities on behalf of the Union as a union steward. Respondent claims that Darby was discharged because of her violation of work rules, in particular the rules pertaining to attendance and punctuality. Darby was hired in September 1978 and discharged on June 29, 1979. She was employed as an assembler of the side walls of trailer units, and utilized a rivet gun in the course of performing her duties. She worked with a crew of several other individuals at a certain location at an assembly line that moved by a conveyor belt system. Her crew was supervised by Maxine Cunnup, whose supervisory status under the Act is admitted.

Toward the end of December, Darby became a union steward, and served as a steward for the remaining 6 months of her approximate 9-month tenure. Darby processed approximately 45 grievances. The record provides no information upon which it can be concluded that 45 grievances is excessive, routine, or below average in comparison with the activity of other stewards past and present. The record is silent as to whether these grievances were processed beyond the initial steps in the grievance procedure, whether they concerned matters of substance, or whether Respondent reacted to any of these grievances in an overt manner.

In order to assist an employee in the processing of a grievance, the steward must obtain permission from the

Supervisor to leave her work duties. Darby testified that Supervisor Cunnup caused her "difficulties" in the processing of grievances. These difficulties consisted of delaying permission to leave her work station and refusing to acknowledge receipt of a grievance by signing the grievance form.[2] Darby conceded that generally Cunnup readily granted permission to her to process grievances and on only two occasions did she delay the granting of permission. On one occasion the delay was for 1 hour, and on the other occasion it was for 30 minutes. On both occasions no explanations were made by Cunnup, but none were requested by Darby, and no discussion whatsoever arose on either occasion. Clearly an employee's absence from the assembly line has some impact on production, and it is not unreasonable that on 2 of 45 occasions Darby was not granted immediate permission to leave the assembly line. Darby failed to testify as to the specific occasions when Cunnup failed to sign a grievance. No testimony was adduced as to the circumstances involved or what the impact was, if any, of Cunnup's failure to acknowledge, in writing, receipt of a grievance.

Doris Coffey was hired in 1973 and worked as an assembler. At the time of the hearing she was in layoff status. She served as a steward for 1-1/2 years in 1977 and 1978 and was supervised by Cunnup. She also testified in a generalized fashion that she experienced delays in receiving permission to leave her work station to process grievances, and that on "several" occasions Cunnup failed to sign an acknowledgement of receiving a grievance. She failed to testify as to when these events occurred, the circumstances of the occurrences, what was discussed, if anything, and what impact, if any, resulted. Thus, it is impossible to conclude that Cunnup impeded the grievance procedure or was even hostile to grievance activity based upon such vague testimony concerning these supposed "difficulties."

The General Counsel adduced testimony which he argues evidences Respondent's hostility toward union stewards and union representatives. The General Counsel contends that upon becoming stewards the work duties of Darby and Coffey became more onerous.

Darby testified that after her assumption of the steward position Cunnup assigned to her less desirable jobs consisting of cleaning and sweeping the floor and picking up scraps. She conceded that these jobs were normally performed by other members of her crew and that she herself had been assigned such functions prior to becoming a steward. She conceded that her duties were no different than other crew members. She testified that she had to perform these jobs more frequently after she became a steward. She testified that in the 3-month period of nonstewardship she performed these duties once or twice, but thereafter in the next 6 months she was called upon four or five times to do them. There is no evidence that with respect to these tasks that Darby was treated any differently from other employees or that she performed these tasks more often than other employees.

Darby testified that as part of her duties she, like other assemblers, was rotated in assignments to the job of cutting rolls of fiberglass insulation in another department. Such assignments entailed a part of a day or sometimes a whole day. The job is not more difficult, involves no lifting, but does cause a skin discomfort which necessitates the wearing of protective clothing. She testified that in the 6-month period of time after her acceptance of the stewardship her assignments to the fiberglass department increased to four, five, or six occasions whereas previously they occurred only once or twice in the preceding 3 months. Fiberglass installation is not made in every trailer unit but occurs only when there is a special order. Cunnup advises the crew when the approaching unit requires fiberglass insulation. Most units do not require it. Darby claimed that after December 1978 she was always selected as part of the group for the fiberglass assignments whereas previously seniority somehow was utilized as a factor. She conceded that she had less seniority than other crewmembers. Her testimony in this regard was hesitant, vague, and uncertain. She did not explain how her seniority was ignored. In any event, she conceded that at no time did she ever protest these so-called arduous assignments.

Coffey testified that after she was designated a union steward she experienced more varied assignments; i.e., she was moved around more frequently. However, she conceded that other employees were also moved around. One of these other jobs involved cutting of fiberglass insulation. She testified that such assignments were made by simple rotation, that seniority was not a factor, and that she was rotated in a "similar fashion" as were other employees.

The testimony of Darby and Coffey fails to establish a practice of assigning more arduous work duties to union stewards.

Darby testified that as a union steward she was subjected to closer scrutiny by Cunnup while engaged in her normal work duties. Her testimony in this regard is even more generalized, subjective, and conclusionary than the aforedescribed testimony with respect to work assignments and is of no probative value.

Finally, the General Counsel contends that the testimony of Leroy Ervin demonstrates antipathy toward union representatives. Ervin has been employed by Respondent as a production welder. He is also president of the Union.

The welding section of Respondent's operation is supervised by two persons, Troy Thomas and David McCummings. Their supervisory status is admitted. In the spring of 1979 Ervin was supervised at various different times by these supervisors. It is McCummings' uncontradicted and credible testimony that it was common practice for welders to be transfered temporarily from department to department according to the welding needs.

Ervin testified that in April or March 1979 he had engaged in conversations on two separate occasions with McCummings and/or Thomas concerning his temporary assignments to different departments. Ervin testified that on one occasion, in the plant while alone, a conversation

[2] Presumably the contractual grievance procedure requires her signature. The collective-bargaining agreement was not put into evidence.

transpired between himself and McCummings wherein Ervin asked why he was being "transfered so much" and "being harassed," and that McCummings replied that he had received orders from Assistant Plant Manager Dave Minnock on "how to handle the union president and people in the Union." and that he would "fight fire with fire." Nothing else was said, according to Ervin. There is no context given for this conversation. There is no explanation of what Ervin meant by "harassment." There is no evidence that Ervin's assignments were arduous or that he received disparate treatment. There is no evidence that any friction existed in the relationship between the Union and the Respondent. Thus Ervin's testimonial reference to "harassment" and "fighting fire with fire" is rendered in a vacuum.

McCummings testified that he engaged in a conversation with Ervin about 4 months prior to the hearing during which Ervin asked him why he was shifted about in his assignments, but that McCummings responded that Ervin was well aware of the reason, which was the downturn in production work and the high number of layoffs which resulted therefrom. McCummings admitted that over the last year and a half he has had numerous conversations with Ervin, but asserted that there was rarely a reference to union matters in these conversations. He conceded that at one time Ervin told him that he felt that he was being shifted about in his assignments because he was the union president. McCummings could not recall his exact response but denied that he told Ervin that Ervin was moved about because of his position with the Union or that he made any reference to having received instructions to "fight fire with fire." McCummings testified that his response to Ervin was that assignments were unrelated to his subordinates union position and that "I don't use my people that way."

Overall, I found McCummings to be the less hostile, more objective, less argumentative, and the more certain, responsive, spontaneous, and convincing witness. I credit his testimony. I conclude that the General Counsel has therefore failed to sustain his burden of proof with respect to the only incident of 8(a)(1) conduct alleged in the complaint.

The second conversation with Troy Thomas was not alleged in the complaint as violative conduct, but was offered by the General Counsel as evidence of Respondent's animosity toward union representatives. Ervin testified that in a conversation, the details and context of which were not revealed, he asked Thomas why he was transfered so frequently and "harassed," and that Thomas responded that Ervin was "being moved because [he] was the union president." As with respect to the McCummings conversation, there was no testimony as to what was meant by "harassment." There was no testimony as to whether Ervin was shifted about more than other welders, whether such shifting about caused him to sustain any more arduous working conditions than other welders, or, indeed whether such shifting assignments even inconvenienced him. There is no evidence that Respondent could reasonably believed that such assignments interfered in any way with Ervin's union duties, or that prior to this conversation Ervin had expressed a desire not to be shifted about in his welding assignments. Thomas did not testify. However, I find Ervin's testimony to be so cryptic and vague and devoid of context that I can not rely upon it as meaningful, probative evidence of antiunion hostility.

B. *The Discharge and Preceding Events*

Industrial Relations Manager Walt Morgan testified, without contradiction, that Respondent maintains a progressive disciplinary system and a body of written work rules. The progression of discipline ranges from: (1) verbal warning, (2) written warning, (3) 3-day suspension, (4) discharge. Morgan testified that, although the progression of discipline is generally followed, there are circumstances when it is not. With respect to attendance and punctuality, Morgan testified that it is Respondent's policy to take disciplinary action when there occurs within a 30-day period two absences, a combination of one absence and two instances of tardiness, or 3 instances of tardiness that have not been approved in advance or subsequently excused. That policy was promulgated and effectuated as of October 3, 1977. Morgan testified that Respondent had experienced attendance problems during the material times herein. The degree of discipline for infraction of the attendance rules depends upon what steps have been reached in the progressive disciplinary system. The progression in discipline is activated by the commission of any rule violation and need not depend upon the infraction of the same rule.

On January 22, 1979, Darby received a 3-day suspension for violation of work rule 2, which states as misconduct: "Falsification of any company records, or ringing clock of any other employee or deliberately or knowingly allowing another person to use your badge to enter the plant." In his brief, the General Counsel argues that said action is evidence of animosity because Respondent deviated from the progressive disciplinary system which calls for a verbal warning for the first offense. However, from Darby's own testimony it appeared that Respondent had reasonable grounds to conclude that she had misrepresented the illness of her child in order to be absent from work.[3]

On April 20, Darby received a verbal warning for tardiness. She testified that at the time she did not believe that she was tardy, but that she did not check the records or challenge the discipline then or thereafter.

On May 23, Darby received a written warning for violation of work rules 10 ("faulty and/or careless work") and 25 ("repeated violation of work rules"). On May 24 she received a 3-day suspension for violation of work rules 6 ("unnecessary, deliberate, or careless abuse or destruction of company property"), 24 ("being insubordinate or using insulting or abusive language toward a company supervisor"), and 25 ("repeated violation of work rules"). Darby did not testify as to the May 23 dis-

[3] Darby testified that while at work she had received a message from home that her child had taken ill at school. She used that as an excuse to leave work. Subsequently, she discovered that her child was not ill and the school had sent her no such message. However, she did not return to work. The next day she was confronted by her superior with the information that the school had sent no message to her and it was concluded that she was lying. Respondent offered no testimony as to this incident.

cipline. There is no evidence that the May 23 discipline was unjustified. Darby testified that when she received the May 24 discipline she protested that she did not deserve it. That disciplinary action was based on an incident that occurred on the assembly line on May 23. On that date Cunnup told the assembly crew, including Darby, that if they did not speed up their work she would take them "to the office." At that moment a rivet gun was either accidentally dropped or deliberately released by Darby and it fell on the floor next to Cunnup. Darby was accused of deliberate conduct. She testified that the rivet gun slipped out of her hand by accident immediately after Cunnup had orally warned the employees to speed up. Respondent did not adduce the testimony of Cunnup. In his brief, counsel for the General Counsel contends that such treatment is evidence of hostility and disparity of treatment.

On June 10 and 24 Darby was tardy without an excuse. On Monday, June 25, Darby was absent without an excuse. She was again tardy without an excuse on Thursday, June 28. On Friday, June 29, she was notified that she was discharged because of her irregular attendance. She admitted that she was aware of the progressive disciplinary system.

The General Counsel concedes that Darby was absent and tardy in the above-noted 30-day period. The General Counsel argues, however, that Darby was treated disparately inasmuch as three other employees employed during a similar period who had similar attendance records were not discharged; i.e., Jenny Wallace, Johnnie Belk, and Gloria Washington.

According to Respondent's records and the testimony of Manager Morgan, in January 1978 Jennine Wallace was late on three occasions and absent on three occasions without an excuse or adequate reason. On January 27, 1978, Wallace received a verbal warning for her attendance record. From April 20 through September 1978 Wallace received an excused medical leave of absence. In September 1978 Wallace was absent without an excuse four times and tardy once. Her record fails to show any other 30-day period in which she was absent and/or tardy 3 times without an excuse before or after the fact. The General Counsel did not establish that Wallace violated Respondent's attendance rules with impunity. She is employed by Respondent in a layoff status. The record does not reveal that discharge was warranted. There is also no evidence as to whether Wallace was a nonmember of the Union or an inactive union member.

In October 1978, Washington, a nonunion member, was absent five times without having given advance notice and accordingly she was inititally recorded by Respondent as absent without an excuse on five dates. However, because she subsequently supported her absences with evidence of an adequate excuse for three of those dates, e.g., medical notes, etc., as indicated in part on her record and in part by Morgan's uncontradicted testimony she was only absent without an excuse for 2 days in that 30-day period. Washington was on excused medical leave from November 22 through February 9, 1979. She experienced a variety of after-the-fact excused and some unexcused absences thereafter. Between April 30 and March 10, 1979, Washington was absent and tardy without an excuse and was issued a written warning for irregular attendance and repeated violation of the work rules. On May 16 she received a written warning for violation of work rule 15 ("repeated failure to be in place ready to begin work at starting time or making preparation to leave work before quitting time either at rest periods, lunch period, or end of the shift"). On May 24, 1979, Washington was issued a written reprimand for violation of work rule 10 ("faulty and/or careless work") and work rule 25. In the 30-day period for June 1979 Washington's attendance record reveals that she was absent without an excuse on four occasions of which the last three occurred on June 27, 29, and 30. In July she was absent without an excuse on July 18, 19, and 20, and, in consequence, she was discharged.

Thus, Respondent issued 3 written warnings to Washington in a period of 1-1/2 months and did not levy a disciplinary layoff according to its progressive disciplinary system. However, Washington was ultimately discharged.

With respect to employee Belk the General Counsel adduced her attendance record into evidence. However, as with Wallace, the General Counsel did not adduce into evidence the disciplinary record of this employee. Morgan, who was called as an adverse witness by the General Counsel, had no independent recollection of whether Belk or Wallace were issued or not issued disciplinary notices. No evidence was adduced by the General Counsel that Belk was not disciplined.[4] Moreover, it is not clear from Belk's attendance record that her unexcused absences and tardinesses warranted discharged. In oral argument and in his brief counsel for the General Counsel ignores the uncontradicted and credible testimony of Morgan that an after-the-fact accepted explanation for an absence or tardinesses eliminates that event from the combination of absences and tardiness which warrants disciplinary action.

Belk, Wallace, and Washington, unlike Darby, all had experienced prolonged periods of medical problems.

From the foregoing review of the attendance records, I cannot conclude that Belk and Wallace possessed the same degree of unexcused absences and tardinesses as did Darby. Washington's attendance record and disciplinary record indicates that she was discharged with not quite the same alacrity as in Darby's situation.

C. *Conclusions*

The General Counsel concedes that Darby violated Respondent's attendance rules. Although it appears that the attendance rules were not followed universally, as is evidenced by a somewhat greater tolerance of employee Washington, Morgan's testimony as to the general application of these rules is not effectively discredited. Accordingly, grounds existed for Darby's discharge. The General Counsel argues that the facts of this case establish that a motivating factor for the enforcement of the

[4] This is also true of Wallace except that Morgan, having refreshed his recollection by viewing her file, testified as to the January 22, 1974, verbal warning. The General Counsel had access to these records during the hearing but only sought to introduce the attendance records of Wallace and Belk unaccompanied by the disciplinary records.

attendance rules in Darby's case was Respondent's hostility to her activity as a union steward and its hostility toward all union representatives of the unit employees. Accordingly, the General Counsel argues that the burden of demonstrating that the discharge would have occurred had it not been for Darby's union position and activities shifts to Respondent. The General Counsel cites *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). It is argued that Respondent has not sustained its burden. However, I do not agree that the General Counsel has established that Darby's union position and activities constituted a motivating factor in the decision to discharge her.

The General Counsel has established that Darby was an active union steward. He has not established with any degree of clarity the relative significance or degree of that activity. He has not established by competent and credible testimony that Respondent was hostile to the union activity of Darby or any other union representative.

As found above, Respondent was not shown to have discriminated against Darby with respect to the assignment of work, nor was it shown to have evidenced hostility to her grievance-filing activities in its dealings with her or with any other union representative.

The General Counsel argues that Respondent treated Darby in a discriminatory fashion with respect to the application of its disciplinary system after she had become the union steward, and accordingly an inference ought to be raised that such disparity of treatment was motivated by her union activities.

Darby's first discipline was received on January 22. This occurred about 1 month after she had become a steward and 4 or 5 months after she was hired. Respondent had reasonable grounds to conclude that she had engaged in misconduct. The General Counsel adduced no evidence to demonstrate that other employees would not have been disciplined for the same misconduct. The General Counsel argues that the Respondent deviated from the progressive disciplinary system in issuing a discipline of suspension. However, Morgan testified that the progressive disciplinary system was not universally applied. There is no showing by the General Counsel that other employees of similar tenure who engaged in similar conduct were treated less harshly. It is true that Respondent did not adduce testimony on this incident having conceded that Darby's account was accurate. Respondent's failure to adduce testimony to rebut Darby causes me to credit Darby; however, I cannot infer more from Darby's testimony than that which she testified. Her own testimony does not demonstrate that she was treated disparately. Furthermore, she had been a steward of only 1 month's experience. There is no evidence as to what her union activities were up to that time. There is no probative evidence that Respondent treated other stewards in a disparate fashion. In any event, it does not appear that the January 22 discipline was imposed for the purpose of constructing a dossier to serve as a pretext for discharge. Upon the next disciplinary event Respondent started from the beginning with a verbal warning rather than the next step in the progression of discipline. The January 22 discipline was removed from the progression of discipline.

The second suspension of Darby followed the progression of discipline. Again the facts in the record concerning this suspension are based upon Darby's own testimony. In that incident Respondent concluded that she had deliberately dropped or thrown a rivet gun at the feet of her line supervisor as an expression of open contempt. Because of the timing involved, Respondent cannot be said to have acted without some basis. The General Counsel argues that Darby was treated disparately because rivet guns frequently have been dropped in the plant, and no one has been disciplined for dropping a rivet gun. However, there is no evidence that rivet guns were "dropped" under similar circumstances. Moreover, the evidence does not establish that no one was ever reprimanded for dropping a rivet gun. At most, it indicates that Coffey and Darby were unaware of any grievances that were processed for reprimands issued for the dropping of rivet guns. Therefore, although the Respondent adduced no testimony on the rivet gun incident, I cannot conclude that the General Counsel has established enough evidence to raise an inference that Respondent suspended Darby for some reason other than its belief that she acted insubordinately.

I conclude that the General Counsel has demonstrated that Darby was a steward and did file grievances. The General Counsel has demonstrated that Respondent discharged Darby because of her admitted irregular attendance during a time when it experienced attendance problems with its employees. Although the General Counsel has adduced evidence that Respondent has not followed its progressive disciplinary system universally, in the absence of competent, probative evidence of union animus, I cannot infer that Respondent's application of its disciplinary policy in Darby's case was motivated even in part because of her union position or activities.

Accordingly, I conclude that the General Counsel has not sustained his burden of proof and I recommend the following:

ORDER[5]

It is recommended that the complaint be dismissed in its entirety.

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.